

FEDERAL CIRCUIT COURT OF AUSTRALIA

Ngo v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCCA 1346

File number(s): SYG 1895 of 2017

Judgment of: **J STREET**

Date of judgment: 16 June 2021

Catchwords: **MIGRATION** – Administrative Appeals Tribunal – application for a Partner (Residence)(Class BS) (Subclass 801) Visa – whether the Tribunal had a genuine intellectual engagement with the applicant’s evidence – no jurisdictional error made out – amended application dismissed.

Legislation: *Migration Act 1958* (Cth), ss 5F(2)(a), 476.
Migration Regulations 1994 (Cth) r 1.15A, cl 801.221(2)(c)

Cases cited: *Gunatillake v The Minister for Immigration* [2021] FCA 387

Number of paragraphs: 28

Date of hearing: 16 June 2021

Place: Sydney

Counsel for the applicant: Mr L Karp

Solicitors for the applicant: TQH Lawyers

Counsel for the first respondent: Ms A Carr

Solicitors for the first respondent: Mills Oakley

ORDERS

SYG 1895 of 2017

BETWEEN: **THI PHUONG DUNG NGO**
Applicant

AND: **MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT
SERVICES AND MULTICULTURAL AFFAIRS**
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

ORDER MADE BY: JUDGE STREET

DATE OF ORDER: 16 JUNE 2021

THE COURT ORDERS THAT:

1. The name of the first respondent is changed to “Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs” and the Court dispenses with the need for the filing of any further document in that regard.
2. Leave is granted to the applicant to rely on the grounds identified in the draft amended application annexed to the submissions dated 24 May 2021 and the amended application with details of the correct solicitor is to be filed and served on or before 5pm 18 June 2021.
3. The amended application is dismissed.
4. The applicant pay the first respondent’s costs fixed in the amount of \$5, 700.00
- 5.

REASONS FOR JUDGMENT

JUDGE STREET:

1 INTRODUCTION

2 This is an application for a constitutional writ within the Court’s jurisdiction under s 476 of the *Migration Act 1958* (Cth) (“the Act”) in respect of a decision of the Administrative Appeals Tribunal (“the Tribunal”) made on 16 May 2017, affirming a decision of a delegate of the first respondent (“the delegate”) not to grant the applicant a Partner (Residence)(Class BS) (Subclass 801) Visa (“the Residence Partner Visa”).

3 The applicant is a citizen of Vietnam who arrived in Australia on 30 July 2012 on a Prospective Marriage (Subclass 300) Visa. On 14 December 2012, the applicant, with the assistance of a registered migration agent, applied for a Partner (Temporary) (Class UK) (Subclass 820) visa (“Temporary Partner Visa”) and Residence Partner Visa. In that application, the applicant indicated that she met the sponsor in Vietnam in July 2010 and that their relationship commenced in September of that year.

4 The applicant and her sponsor were married on 19 August 2012. The sponsorship form (40 SP) for a partner to migrate to Australia had been completed by the sponsor. The form indicated that the sponsor lived in a house with four bedrooms and five other people including the applicant, his sister and her spouse and two sons. The form also indicated that the applicant would not be living with her sponsor.

5 On 10 April 2013, the Delegate granted the applicant a Temporary Partner Visa. On 16 November 2015, the Department of Immigration and Border Protection (“the Department”) wrote to the applicant, inviting her to comment on adverse information in relation to her Residence Partner Visa which related to various Facebook posts.

6 On 26 November 2015, the applicant’s representative provided a statutory declaration in response to the invitation to comment, made by the applicant on 25 November 2015. On 25 February 2016, the Delegate refused the applicant’s application for a Residence Partner Visa.

7 On 3 March 2016, the applicant applied for review of the delegate’s decision to the Tribunal. On 22 December 2016, the Tribunal invited the applicant to attend a hearing on 2 March 2017.

8 On 28 February 2017, the applicant’s migration agent provided various supporting documents to the Tribunal, including statutory declarations relevantly made by the applicant and applicant’s sister-in-law.

9 On 2 March 2017, the applicant, her spouse and the registered migration agent attended the hearing before the Tribunal. A transcript of the hearing has been annexed to an affidavit admitted into evidence and identifies evidence in relation to where the parties sleep and identified that it’s a one storey building and that the last room in the house is the bedroom shared by the applicant and the sponsor.

10 On 13 April 2017, the Tribunal invited the applicant to comment in respect of various Facebook posts. On 5 May 2017, a response was provided including a further statutory declaration.

11 THE TRIBUNAL DECISION

12 On 16 May 2017, the Tribunal affirmed the decision of the delegate.

13 The Tribunal accepted that the applicant and sponsor were married to each for the purpose of s 5F(2)(a) of the *Act*. The Tribunal identified the relevant law, including an attachment to the Tribunal’s reasons in respect of the requirements of r 1.15A of the *Migration Regulations 1994* (Cth) (“the Regulations”). The Tribunal, also in paragraph 13, made express reference to the statutory declarations that had been provided to the Tribunal, referring relevantly to the statutory declaration of the applicant’s sister-in-law.

14 The Tribunal referred to the applicant’s oral evidence about having been married for nearly five years and that the sponsor and applicant have an emotionally supportive relationship. The Tribunal also referred to the applicant’s oral evidence that she had lived with her sponsor and his family since she arrived in Australia in the home owned by the sponsor’s younger sister. The Tribunal referred to the applicant saying that she and the sponsor occupied one bedroom in the home owned by the sponsor’s younger sister and that they hoped one day to move into their own home. The Tribunal referred to the other members in the four bedroom home and referred to the evidence that applicant and the sponsor work in the family business.

15 The Tribunal found that there was insufficient documentary evidence to corroborate the applicant’s and the sponsor’s claims that they shared expenses and pooled finances. The

Tribunal accepted that the applicant and her sponsor lived in a home owned by the sponsor's sister with four other adults and three children who are members of the sponsor's extended family. The Tribunal accepted there was a degree of collaboration or cooperation between the adult members of the household and noted that it could not distinguish how the applicant and sponsor established their own household within the broader household.

16 The Tribunal referred to the applicant's marital status on her Facebook page on 19 August 2012 and was satisfied that the subsequent lack of photographs of the applicant and the sponsor or references to her and the sponsor's marriage does not support the proposition that the applicant and sponsor were living in a close committed relationship. The Tribunal noted that the applicant had uploaded to her Facebook on two occasion's photographs of her and her sponsor and had changed her Facebook profile picture to include an image of herself with her sponsor.

17 The Tribunal placed limited weight on those photos as they were of the applicant and her sponsor in limited settings and noted that the profile picture had been updated after receipt of the Department's letter dated 16 November 2015. The Tribunal referred to the applicant making three return trips to Vietnam without her sponsor and only one trip with her sponsor and found that that trip was mitigated by the fact it occurred after the Delegate's decision. The Tribunal placed weight on the fact that the applicant maintained an exclusive relationship with her sponsor since their marriage and had lived with her sponsor for that time.

18 The Tribunal noted that the applicant had given evidence that her and her sponsor intended to move out of the current home but was not satisfied that the applicant provided a plausible reason as to why this had not yet occurred. The Tribunal also noted the oral evidence that the sponsor would like to start a family without success to date, but had not sought any fertility treatment. The Tribunal was satisfied that the applicant and her sponsor presented to some friends and members of the family as a couple, but was not satisfied that this was presented to the wider community, as the Tribunal noted that there was considerable evidence of a lack of separateness.

19 The Tribunal overall found there was a lack of sufficient evidence to demonstrate that the applicant and her sponsor were at the time of the Tribunal's decision, living together in a genuine and continuing relationship or that they had a mutual commitment to a shared life to the exclusion of all others. Accordingly, the Tribunal was not satisfied that the applicant and

sponsor were in a genuine spousal relationship and therefore the applicant did not meet the requirements of cl 801.221(2)(c) of the *Regulations*.

20

21 THE GROUNDS

22 Grounds 2 and 3 of the original application were withdrawn in the amended application.

23 The Grounds in the applicant's amended application are as follows:

Ground 1

The second respondent (the Tribunal), erred in failing to lawfully consider the evidence in a statutory declaration made by the applicant's spouse's sister that:

- a) The applicant and her spouse share a room at her home, and,
- b) "They help each other with everything"

Ground 4

The Tribunal erred in failing to lawfully consider the evidence in a statutory declaration of Khoa Dang Nguyen that the applicant and her spouse were "always smiling and laughing when they are with each other".

Ground 5

The Tribunal failed to lawfully consider the evidence given by the applicant at hearing to the effect that she and her husband slept in the same room and same bed.

24 Mr Karp of Counsel for the applicant, confirmed that the particular (b) in Ground 1 and Grounds 2 and 3 were not pressed.

25 GROUND 1 AND GROUND 5

26 Mr Karp took the Court to the evidence of the sister-in-law and the evidence in the statutory declarations referred to in each of the grounds as well as the transcript, which was also expressly referred to in his written submissions. Mr Karp also relied upon authorities as to the consequences of the absence of an express reference to the subject matter upon which he relied and placed weight on what was said in particular at paragraphs 73 and 74 in *Gunatillake v The Minister for Immigration* [2021] FCA 387 ("*Gunatillake*").

27 Mr Karp submitted that the failure to expressly refer to the evidence given by the applicant as to the sharing of a room at the four bedroom home, was evidence of such materiality that the Court should infer that there was not a genuine intellectual engagement with the applicant's

evidence in relation to the sister's spouse. The same submission was in substance advanced in relation to the statutory declaration, in that the applicant and spouse were always smiling and laughing when they were with each other and in relation to the evidence that the applicant gave at the hearing, being that she and her husband slept in the same room and in the same bed.

28 The Tribunal's reasons made clear in relation to Ground 1 and Ground 5 that the Tribunal accepted that the parties live together and had appreciated from the description of the home that they were in the same room. There was no requirement in these circumstances for the Tribunal to expressly refer further to the occupation of the bed nor was that evidence of such materiality in the context of the findings by the Tribunal that it required express reference. The Court does not accept that there was any failure to have a real and meaningful engagement with the evidence advanced in relation to Grounds 1 and 5.

29 No jurisdictional error is made out by Grounds 1 and 5.

30 **GROUND 4**

31 In relation to Ground 4, it is apparent that the Tribunal accepted the evidence in relation to the sponsor and the applicant presenting to some as a couple. The evidence in relation to being always smiling and laughing was not of materiality. Express reference to that evidence was not required in the Tribunal's reasons, given the findings made by the Tribunal in relation to how the applicant and sponsor presented to others. There was no requirement for the Tribunal to make any express reference to the evidence of which was the subject of Ground 4.

32 Further, the statutory declaration had been expressly referred to in the Tribunal's reasons. The Court does not accept that there was no genuine intellectual engagement with the applicant's claims and evidence as advanced in relation to Ground 4. The applicant has not established the alleged failure to consider the evidence in the statutory declaration referred to in Ground 4. Therefore, no jurisdictional error as alleged in Ground 4 is made out.

33 The amended application fails to make out any jurisdictional error.

34 Accordingly, the amendment application is dismissed

35

36

37

38

39

40

I certify that the preceding twenty-eight (28) paragraphs are a true copy of the settled transcript of the published oral reasons for judgment of Judge Street delivered in open Court on 16 June 2021 and the parties were sent a sealed copy of the Court's orders.

Associate:

Dated: 13 October 2021

41